



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

be observed that the court does not apply this rule to injuries from concurrent negligent causes, due to independent authors, the effects of which are **inseparable**, for in such a case each tortfeasor would be liable for the whole damage done. The distinction is well drawn in a note appended to this case in the March Number of the Harvard Law Review, vol. XXIII, p. 405, which we copy: Tortfeasors are jointly and severally liable not only where they have acted in concert, or for a common purpose, but also where their originally independent acts have united to cause a single, inseparable injury. *Slater v. Mersereau*, 64 N. Y. 138; *Barnes v. Masterson*, 38 N. Y. App. Div. 612. It does not follow, however, that because it is very difficult to separate injuries into component parts, they form a single injury. *Little Schuylkill Navigation, etc., Co. v. Richards's Adm'r*, 57 Pa. St. 142. So even though an act, otherwise lawful, becomes a nuisance because other independent acts contribute, each tortfeasor is liable only for his share. *Harley v. Merrill Brick Co.*, 83 Ia. 73. It is true that equity will restrain all such independent tortfeasors by a single bill analogous to a bill of peace. *Lockwood Co. v. Lawrence*, 77 Me. 297. See *Pomeroy Eq. Juris.*, 3 ed., § 269. But one injunction merely prevents each defendant from doing what he has no right to do, whereas one judgment would exact payment for a wrong done by another. *Blaisdell v. Stephens*, 14 Nev. 17. In the principal case, each bit of the defendant's refuse harms a distinct bit of the plaintiff's sand-bar, though it is practically difficult to measure their combined extent. *Swain v. Tennessee Copper Co.*, 111 Tenn. 430. But if his refuse united with that of the others to form a single injurious compound, a clear case of joint and several liability would be found.

BAUGHER v. HARMAN.

Nov. 18, 1909.

[66 S. E. 86.]

1. **Municipal Corporations (§ 705*)—Use of Street—Acts Constituting Negligence.**—Defendant and another were carefully driving an automobile on a crowded street at a speed of from four to six miles an hour, which was within the speed limit, and did not discover that a horse, which plaintiff and another were holding while it was being hitched, was frightened and shying at the automobile, until they were passing it and were about as near to it as the "width of the courtroom," and the horse did not become unmanageable until they had passed it. Defendant did not notice that one of the men at the horse motioned him to stop, and was not aware of plaintiff's danger until he was opposite to or had passed it; it having merely shied up to that time. Held, that defendant was not negligent in

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

not stopping his automobile until after passing the horse some 40 or 60 feet.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705;* *Highways*, Cent. Dig. § 469.]

2. Negligence (§ 121*)—Burden of Proof.—The burden is on plaintiff of proving actionable negligence, notwithstanding the rule making negligence for the jury where reasonable men might differ on the question.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 224; Dec. Dig. § 121.*]

3. Appeal and Error (§ 1001*)—Jury Question—Conflicting Evidence.—A verdict should not be disturbed on appeal where reasonable men might fairly differ as to whether the evidence showed negligence,

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

4. Highways (§ 183*)—Negligent Use—Inevitable Accident.—While the liability imposed by law for injuries caused by negligence in operating automobiles on a public highway should be strictly enforced, automobile owners or drivers should not be held liable for injuries caused by inevitable accidents, to which they have innocently contributed.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 470; Dec. Dig. § 183.*]

Error to Circuit Court, Augusta County.

Action by Harman against Baugher. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

J. M. Perry and R. S. Ker, for plaintiff in error.

Chas. & D. Curry, for defendant in error.

WHITTLE, J. This action was brought by the defendant in error, Harman, to recover of the plaintiff in error, Baugher, damages for personal injuries which are alleged to have resulted from the defendant's negligence.

The essential charges in the declaration are that the plaintiff was standing in front of a horse, holding it by the rein, while the animal was being hitched to a buckboard by the owner and an assistant on Central avenue, in the city of Staunton; that the defendant came along the avenue in an automobile, at sight of which the animal, being in plain view of the defendant, gave evidences of fright, and it was apparent that it was liable to run

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

away and injure the plaintiff; that thereupon one of the men who was engaged in hitching the horse to the buckboard waved his hand in the direction of the defendant as an indication of danger, and it became the duty of the defendant to stop his automobile, yet the defendant, well knowing the plaintiff's danger, continued to advance, whereupon the horse became uncontrollable and plunged forward, knocking the plaintiff down and pulling the vehicle over him, and inflicting the injuries of which he complains.

There was a verdict and judgment for the plaintiff, to which judgment this writ of error was awarded.

The evidence tends to show: That Central avenue is one of the main thoroughfares of the city of Staunton, and that the accident occurred on court day, when it was thronged with travelers and vehicles. That the defendant, in company with his friend, Miller, was running his machine along the avenue in a careful manner and at a rate of speed estimated at from four to six miles an hour (well within the speed limit fixed by law), and was keeping a lookout to avoid accidents. That he did not discover the fright of the horse until he was in the act of passing it. That the animal was at that time shying, but was being held by two men, and did not become uncontrollable until after the automobile had gone by. That neither the defendant nor his companion saw the man wave his hand as a cautionary signal. That Miller observed that the horse gave indications of shying when they had approached to within "a little less than the width of the courtroom" from it, but the animal did not at that time manifest severe fright. That the horse was shown to be "automobile shy," but that fact was not known to the defendant at the time of the accident. Moreover, the evidence we think plainly shows that the defendant was not aware of the plaintiff's danger until his machine had reached a point opposite to, or had passed, the horse's head, and that, even if he had discovered the animal's fright earlier, he would have seen that it was in charge of three able-bodied men, and that there was nothing in its behavior to lead one to suppose that it would become unmanageable.

One of the alleged grounds of negligence relied on was the failure of the defendant to stop when the fright of the horse first became known to him; but it was not shown that stopping the machine at that time would have averted the accident. As a matter of fact, it is quite as reasonable to presume that it would have increased the animal's alarm. At all events, the emergency which confronted the defendant was not of his making, but was occasioned by the imprudence of the plaintiff and his companions in undertaking to hitch an animal, whose dangerous character

was well known to them, to a buckboard in a crowded street, when it appeared that there were several hitching lots in the immediate vicinity.

The defendant testified to his actuating motive as follows: "I didn't stop then. If I had, it would have been worse, in my estimation, than to go on like I did; and I went on and stopped about 40 or 60 feet, or something like that, away, and got out of my car and went back. Mr. Harman was holding on to the horse's bridle, and I think the bridle broke, but I don't know what caused him to fall."

There were several assignments of error, but entertaining, as we do, the opinion that the defendant's negligence had not been established, it is unnecessary to discuss them. The principle which devolves upon a plaintiff the burden of proving primarily the existence of actionable negligence is well settled, and does not impugn the oft-repeated rule announced by this court that the verdict of a jury on a question of negligence ought not to be disturbed where the evidence is such that reasonable men may fairly differ as to whether or not there was such negligence.

In *Northington v. Norfolk Ry., etc., Co.*, 102 Va. 446, 46 S. E. 475, it was held: "In an action to recover damages for an injury alleged to have been inflicted by the negligence of the defendant, the plaintiff must show more than a probability of actionable negligence on the part of the defendant. If there is no reliable, substantial evidence to support a verdict for the plaintiff in such an action, it should be set aside."

In *Norfolk & Western Ry. Co. v. McDonald*, 106 Va. 207, 55 S. E. 554, the court quotes with approval the proposition laid down in *N. & W. Ry. Co. v. Cromer*, 101 Va. 671, 44 S. E. 899, that "the existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries based upon no sure grounds of inference."

Judge Cardwell in delivering the opinion of the court in the first-named case observes: "The burden is upon the plaintiff to make out her case, which is in the first instance to establish the negligence of the defendant company by affirmative evidence, which must show more than a mere probability of a negligent act. *Consumers' Brewing Co. v. Doyle's Adm'x*, 102 Va. 399, 46 S. E. 390." See, also, *Berkeley St. Ry. Co. v. Simpson*, 106 Va. 548, 56 S. E. 331.

In the interest of public safety we fully appreciate the importance of a rigid enforcement of the law against the negligent operation of automobiles over the highways of the commonwealth. At the same time, such consideration can afford no justification for mulcting the owners or drivers of such machines, either with damages or fines for inevitable accidents not due to their

fault or negligence, yet to the happening of which they may have innocently contributed.

For these reasons we are of opinion that the circuit court erred in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence, for which error the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

Note.

See this case commented upon editorially, ante, p. 726. The principal interest attaching to it is its being the first case where the court has considered the question of the liability of the operator of an automobile for the frightening of a horse on the highway. The court decides the case on general principles of negligence law entirely, but it may be of interest to see how these principles have been applied in other automobile cases. *Davis v. Maxwell*, 96 N. Y. Supp. 45, is a very similar case, and a verdict was set aside upon almost the same grounds.

Rights in Highway.—As holding that automobiles and other vehicles in common use have equal rights on the highway, see *Indiana Springs Co. v. Brown* (Ind.), 74 N. E. 615; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463; *Needy v. Littlejohn* (Ia.), 115 N. W. 483.

Owners of automobiles have the same rights in the streets and highways of the state that the drivers of horses have. But the right of either class is not to use the means of locomotion without regard to the rights of others having occasion to travel the highway. *Wright v. Crane* (Mich.), 106 N. W. 71; *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044; *O'Donnell v. O'Neil*, 130 Mo. App. 360, 109 S. W. 815; *Simeone v. Lindsay* (Del.), 65 Atl. 778.

"It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury upon the other. And in this the quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence, or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance and power used are common or new to the road; the known tendency of any feature to frighten animals, etc." *Indiana Springs Co. v. Brown* (Ind.), 74 N. E. 615; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196; *Simeone v. Lindsay* (Del.), 65 Atl. 778.

It was held in *Hall v. Compton* (Mo. App.), 108 S. W. 1122, that one driving an automobile upon a public highway in such a manner as to occupy the greater portion thereof will be responsible for an injury sustained by one driving a horse which is gentle and accustomed to automobiles, where the automobile is driven so close to the horse in passing it as to cause it to take fright and suddenly jump sidewise, thereby throwing the plaintiff from his vehicle.

Degree of Care Required.—One operating an automobile on the public highway owes to persons driving horses thereon the duty carefully to control and operate the machine so as to avoid causing needless injury; and this duty requires him to take into account the

character of his machine, its general appearance, the noise accompanying its operation, its new use in the vicinity, its tendency to frighten horses, and, from such and all other pertinent considerations, to proceed with that speed and caution which reasonable care requires according to the place and presence of other travelers. *Indiana Springs Co. v. Brown* (Ind.), 74 N. E. 615; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999; *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *McDonald v. Loder* (Kan.), 101 Pac. 468.

In *Rochester v. Bull* (S. C.), 58 S. E. 766, the court observed: "We think it is a fact of which courts will take judicial notice that automobiles on highways, especially where they are infrequent, have a tendency to frighten animals. The duty, therefore, devolves upon the drivers of such machines to exercise due care to prevent accidents. The amount of care necessary varies with the various circumstances. Acts which, in a given case, might be negligence, in another might be due care. Therefore, it is almost absolutely necessary that what action amounts to due care must be a question of fact."

One driving an automobile in a public highway is bound to take notice that such a machine is likely to startle horses, when driven toward them at a rapid rate. *McIntyre v. Orner*, 166 Ind. 57, 4 L. R. A., N. S., 1130, 76 N. E. 750.

Duty to Stop or Slow Down.—Where the evidence of fright is manifest, it is negligence not to stop or slow down. *Indiana Springs Co. v. Brown* (Ind.), 74 N. E. 615; *Brinkman v. Pacholke*, 84 N. E. 762, 41 Ind. App. 662; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463. See extensive notes in 1 L. R. A., N. S., 215; 4 Id. 1130, 14 Id. 251.

If the operator of an automobile knows, or by the exercise of ordinary care may know, that his machine has so far excited a horse as to render the animal dangerous and unmanageable, it is his duty to stop the automobile, and take such other steps for the safety of those in the vehicle drawn by the horse as ordinary prudence may suggest. *Shinkle v. McCullough*, 116 Kv. 960, 105 Am. St. Rep. 249, 77 S. W. 196; *Simeone v. Lindsay* (Del.), 65 Atl. 778.

It was held in *Strand v. Grinnell Auto. Garage Co.* (Iowa), 113 N. W. 488, that it is the duty of one operating an automobile, upon the approach of a person driving a horse which becomes frightened when 300 feet away, to stop the automobile, although the driver of the horse does not signal the operator of the automobile to do so (as provided by Iowa act of April 12, 1904), that fact not releasing the driver of the automobile from the duty of exercising ordinary care to avert the accident when he sees that the horse is frightened; the driver of a horse not being required, under all circumstances, to give a signal to stop in order to free himself from the charge of contributory negligence, the question of contributory negligence being for the jury.

The fact that the driver of an automobile successfully passed the plaintiff's team of horses when overtaking them from the rear, will not justify him in assuming that he can pass them when coming toward them. *f.* when 200 feet away, he perceives that the team is making violent efforts to break away. *McIntyre v. Orner*, 166 Ind. 57, 4 L. R. A., N. S., 1130, 76 N. E. 750.

One operating an automobile upon the public streets of a city is bound to use ordinary care in its operation, to move it at a reasonable rate of speed, and to cause it to slow up, or stop, if need be, where

danger is imminent, and can, by the exercise of reasonable care, be seen or known in time to avoid accident. Greater caution is required at street crossings and in the thronged streets of a city than in the less-obstructed streets in the open or suburban parts. *Hannigan v. Wright* (Del.), 63 Atl. 234.

The driver of an automobile is bound to take notice of its effect upon horses which it is approaching on a highway, and, if they exhibit signs of fright, to slow up, stop the machine, or do whatever is reasonably required to relieve the persons in the carriage of their perilous situation. *McIntyre v. Orner*, 166 Ind. 57, 4 L. R. A., N. S., 1130, 76 N. E. 750.

Negligence as Question of Fact.—Where, there is evidence of negligence in the case, generally the questions of negligence and contributory negligence are for the jury. *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999; *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478; *Caurley v. Electric Vehicle Co.*, 68 App. Div. 18, 74 N. Y. Supp. 35; *Caesar v. Fifth Ave., etc., Co.*, 45 Misc. 331, 90 N. Y. Supp. 359; *Needy v. Littlejohn* (Ia.), 115 N. W. 483; *Buxton v. Ainsworth*, 153 Mich. 315, 116 N. W. 1094; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463; *Weiskopf v. Reiter*, 29 Ky. Law Rep. 1268, 97 S. W. 1120; *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972.

Runaway Not Evidence of Negligence.—Negligence is not to be implied from the mere fact that the team ran away. *Coller v. Knox* (Pa.), 71 Atl. 539; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *O'Donnell v. O'Neal*, 130 Mo. App. 360, 109 S. W. 815; *Sapp v. Hunter*, 134 Mo. App. 685, 115 N. W. 463.

It was held in *House v. Cramer*, 134 Iowa 374, 10 L. R. A., N. S., 655, 112 N. W. 3, that one stopping an automobile in front of a corner store would not be liable for the running away of a team hitched near the corner on a side street, although the operator permitted the explosion of the motor to continue after the machine stopped, if, after he saw, or might have seen, that the team was frightened, he could not have stopped the noise in time to obviate the escape of the team.

J. F. M.